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BANK PEMBANGUNAN MALAYSIA BHD v. KETHEESWARAN M KANAGARATNAM

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AZIZAH NAWAWI JCA
B SUPANG LIAN JCA
[CIVIL APPEAL NO: B-02(IM)(NCC)-1302-09-2020]
21 APRIL 2022

C **Abstract** – *A principal obligor in a guarantee agreement is primarily liable for the principal borrower's indebtedness to a lender and such a liability is not dependent or secondary to the liability of the principal borrower. Even if the lender could not recover the loan from the principal borrower for any reason, the principal obligor is still liable to the lender under the principal obligor clause.*

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BANKING: *Guarantee – Principal obligor – Term loan facility – Principal obligor clause – Recovery of sum due and owing under guarantee – Whether guarantee and indemnity given as principal obligor or principal debtor – Whether principal obligor primarily liable for principal borrower's indebtedness to lender – Whether liability* E *dependent or secondary to liability of principal borrower – Whether principal obligor liable to lender if lender could not recover loan from principal borrower*

Asian Broadcasting Network (M) Sdn Bhd ('ABN') was awarded a contract to develop an affordable subscription based digital cable system ('ABN project') by the Government of Malaysia ('Government'). Subsequently, F ABN entered into a facilitation fund agreement with the appellant and the Government, where the Government agreed to provide ABN with a grant of RM100 million to part finance the ABN project. Pursuant to a management agreement, the Government appointed the appellant to manage, monitor, administer and disburse the Government grant to ABN. The appellant G granted a term loan facility of RM450 million to ABN and the facility was secured by a personal guarantee executed by the respondent. However, ABN was later wound up and the amount due and owing by ABN to the appellant under the facility was RM236,796,198.64. The appellant commenced an action against the respondent, at the High Court, for the recovery of the said H sum. The High Court dismissed the appellant's application for summary judgment on the grounds that (i) apart from the conflicting evidence, there was an issue as to whether the respondent, as a surety, was protected under the law of equity when the appellant was said to be acting in an unequitable and unconscionable manner against the borrower, ABN; and (ii) since the I appellant was appointed by the Government to be a co-partner to finance the ABN project, it was a public policy that the appellant had a duty to facilitate ABN towards achieving the ABN project's noble objective of providing digital services to the public. Hence, the present appeal.

Held (allowing appeal)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) From a reading of the clauses in the guarantee, the respondent had given both a guarantee and an indemnity as a principal obligor or principal debtor. A principal obligor is primarily liable for the principal borrower's indebtedness to a lender and such a liability is not dependent or secondary to the liability of the principal borrower. In other words, even if the lender (the appellant) could not recover the loan from the principal borrower (ABN) for any reason, the principal obligor (the respondent) was still liable to the lender under the principal obligor clause. (paras 24-26)

(2) The respondent was primarily liable to the appellant under the principal obligor clause for ABN's indebtedness. The respondent's liability was not dependent on or secondary to the liability of ABN. The guarantee was a stand-alone agreement where the respondent agreed to be the principal debtor himself. Therefore, when an 'event of default' occurred and the sum of RM236,796,198.64 was due and owing by ABN to the appellant, the appellant was entitled to claim the said sum from the respondent as a principal debtor under the terms of the guarantee. (para 26)

(3) Under cl. 5.2 of the guarantee, the respondent agreed that his liabilities would not be reduced, discharged or adversely affected by 'any termination, amendment, variation, novation, supplement or release of or to any of the security documents'. Any alleged unilateral variation to the loan agreement executed by ABN had no bearing on the guarantee. Added to that, cl. 5.2 also provided that the respondent's liabilities would not be discharged by 'any act or omission … which but for this provision might operate to exonerate or discharge the guarantor or otherwise reduce or extinguish its liability under this guarantee'. Further, pursuant to cl. 8.1 of the guarantee, all sums payable by the respondent under the guarantee would be paid in full without any set-off, counterclaim or condition whatsoever. Therefore, pursuant to the provisions of the guarantee, the respondent had clearly contracted his rights away and he was, therefore, precluded from raising any complaint that he was entitled to be discharged in equity. The High Court erred in law in finding that the respondent was protected under the law of equity. (paras 31 & 32)

(4) The guarantee which the parties have entered into was executed with the intention of protecting the appellant against the non-payment of the loans given to the borrower, ABN. The terms and conditions in the guarantee must be given a strict interpretation of what the parties have intended. This was a fit case to allow the application for summary

judgment. The decision of the High Court was set aside and summary judgment was entered against the respondents in terms of the application. (paras 45 & 48)

(5) The High Court was plainly wrong to hold that the appellant had a duty to facilitate ABN towards achieving ABN project's objective based on grounds of public policy. The issue of public policy was irrelevant to the respondent's obligation to pay the sum due under the guarantee. The appellant's rights to enforce the guarantee and the respondent's liability were found within the four corners of the guarantee itself. (paras 40 & 42)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Sumikin Bussan Kaisha Ltd [1992] 4 CLJ 2241; [1992] 2 CLJ (Rep) 59 HC ***(refd)***

American Express Sdn Bhd v. Dato' Wong Kee Tat & Ors [1990] 1 CLJ 17; [1990] CLJ (Rep) 1 SC ***(refd)***

Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC ***(refd)***

Anthony Lawrence Bourke & Anor v. CIMB Bank Bhd [2017] 10 CLJ 167 CA ***(refd)***

Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***

Bank Bumiputra Malaysia Bhd, Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Chung Khiaw Bank Ltd v. Soi Huan & Ors [1985] 1 LNS 71 HC ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Continental Illinois National Bank and Trust Company of Chicago v. John Paul Papanicolaou; The Fedora [1986] 2 Lloyd's Rep 441 ***(refd)***

Export-Import Bank of Malaysia Bhd v. Secco Engineering Sewarage & Environmental Co Ltd & Ors [2012] 9 MLJ 839 ***(refd)***

Heng Cheng Swee v. Bangkok Bank Ltd [1979] 1 LNS 179 FC ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***

The Pacific Bank Bhd v. Kerajaan Negeri Sarawak [2015] 3 CLJ 717 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 14

For the appellant - Kumar Kanagasingam; Chia Oh Sheng, Wong Han Wey & Angel Ngu Ann Chii; M/s Lee Hishammuddin Allen & Gledhill

For the respondent - Prem Ramachandran & Craig Ho Wai Ping; M/s Kumar Partnership

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: BA-22NCC-8-01-2019 (overruled).]

Reported by Najib Tamby

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] This is an appeal against the decision of the learned Judicial Commissioner dated 15 September 2020, dismissing the appellant's application for summary judgment of its claim. The appellant's claim against the respondent is for the sum of RM236,796,198.64, which the appellant claimed to be due and owing by the respondent under a guarantee dated 5 December 2012, executed by him in favour of the appellant.

[2] Having considered the appeal record and the submissions of the parties, we have allowed the appeal with costs.

The Salient Facts

[3] Asian Broadcasting Network (M) Sdn. Bhd. ("ABN") was awarded a contract to develop an affordable subscription based digital cable system (the "ABN project") by the Government of Malaysia.

[4] Subsequently ABN entered into facilitation fund agreement dated 30 July 2012 with the appellant, Bank Pembangunan Malaysia Berhad ("the bank") and the Government of Malaysia whereby the Government agreed to provide ABN with a grant of RM100 million to part finance the ABN project.

[5] The facilitation fund agreement also provided that the Government, pursuant to a management agreement dated 8 August 2011, appointed the bank to manage, monitor, administer and disburse the Government grant to ABN.

[6] By a letter of offer dated 19 October 2012 ("LOO dated 19 October 2012"), letters of changes dated 27 November 2012, 6 February 2013 and 22 April 2014 ("letters of changes") and a facility agreement dated 5 December 2012 ("term loan agreement"), the bank granted a term loan facility of RM450 million ("facility") to ABN, the borrower.

[7] The facility was secured by a personal guarantee dated 5 December 2012 executed by the respondent, in favour of the bank ("guarantee"). The respondent, Tan Sri Datuk (Dr) K. Ketheeswaran is the Group Chairman of ABN Media Group Sdn. Bhd, who owns 70% of the issued and paid-up capital of ABN.

[8] Under the terms of the guarantee, the respondent had agreed, *inter alia*:

(i) to unconditionally and irrevocably guarantee to pay the bank on demand all moneys and liabilities which are at any time become due, owing or incurred by the borrower, ABN to or in favour of the bank under the term loan agreement (cl. 2.2);

(ii) upon the occurrence of an event in default, the guarantee will become immediately enforceable and the powers conferred under the guarantee will become immediately exercisable (cl. 4.1);

(iii) the obligations and liabilities expressed to be undertaken by the respondent under the guarantee are those of a primary obligor and not merely a surety (cl. 5.3); and

(iv) a statement of account issued by the bank as to the amount of monies and liabilities due to the bank the borrower ABN will be final and conclusive proof of indebtedness of the borrower under the term loan agreement and will not be questioned on any account whatsoever (cl. 15.2).

[9] ABN was wound up on 8 May 2017 pursuant to a winding-up petition filed by Sony Malaysia Sdn Bhd. The winding up of ABN constituted an event of default under the terms of the term loan agreement, which triggered the claim to be made against the respondent under the guarantee.

[10] As at 26 July 2017, the amount due and owing by the borrower, ABN to the bank under the facility is RM236,796,198.64.

[11] By a letter dated 26 July 2017, the bank's solicitors demanded for payment of the sum of RM236,796,198.64 from the respondent pursuant to the terms of the guarantee.

[12] When the respondent failed, refused and/or neglected to pay the sum demanded, the bank commenced this action against the respondent for recovery of the sum due and owing under the guarantee.

[13] In a separate action, ABN had commenced Civil Suit No. BA-22NCC-23-03-2021 against the bank seeking general damages for loss and damage suffered by ABN owing to the bank's delayed and erratic disbursements of the facility, its unconscionable conduct and its premature suspension of the facility, which caused the ultimate failure of the ABN project that led to the winding up of ABN.

The Decision Of The High Court

[14] The learned JC had dismissed the bank's application for summary judgment on the grounds that apart from the conflicting evidence, there is an issue as to whether the respondent, as a surety is protected under the law of equity when the bank is said to be acting in an unequitable and unconscionable manner against the borrower, ABN. Added to that, since the bank was appointed by the Government to be a co-partner to finance the project, it is a public policy that the bank has a duty to facilitate ABN towards achieving the ABN project's noble objective of providing digital services to the public.

Our Decision

[15] It is trite that where all the issues are clear and the matter in substance can be decided once and for all without having to go through a full-blown trial, the matter ought to be resolved and decided in an O. 14 application. The court should only exercise the power under the said provision in very clear cases.

[16] In *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282 His Lordship Raja Azlan Shah, CJ, (as His Highness was then) had stated as follows:

> That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC Order 14 procedure. *We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the Judge in Chambers, or, for that matter this Court, shall not deal with the whole matter under RSC Order 14 procedure.* (emphasis added)

[17] Therefore when issues raised in an application are clear cut, on pure question of law, the court should exercise its duty under O. 14 of the Rules of Court 2012 and decide on the question of law even if the issue of law raised is a difficult one. In *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 (SC), Hashim Yeop Sani SCJ said this:

> What is involved in the present appeal is the other principle considered in *European Asian Bank* by Goff LJ (as he then was) that is, what happens when a legal issue is raised by the defence in an O. 14 application. In this regard several principles are involved. Firstly, the Court hearing an O. 14 application should work within the framework of O. 14 and not to embark in an exercise under O. 33 r. 2 which empowers the Court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before trial of the cause or matter. Order 33 r. 2 is entirely for a different purpose. *Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the Court should exercise its duty under O. 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one.* If the Court after considering the argument is satisfied that it is really unarguable then the Court should grant summary judgment.
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> In *Cow v. Casey* [1949] 1 All ER 197 the legal question contended by the defence to be reasonably arguable was the point of law on sub-tenancy and the protection of the Rent Restriction Acts. Lord Greene MR said at p. 481:

> If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the Court has precisely the same duty under O. 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the Court is satisfied that it is really unarguable, the Court has the duty to apply the rule, and, in my opinion, the Master was perfectly right, the Judge was perfectly right, and the appeal should be dismissed.

Referring to *Cow v. Casey* Goff LJ in *European Asian Bank* said at p. 516 on the functions of the appellate Court:

> *But where the appeal raises a question of law, this Court may be more ready to interfere.* Moreover, at least since *Cow v. Casey* [1949] 1 All ER 197, [1949] 1 KB 474, this Court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under O. 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of O. 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the Court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a Judge, with the possibility of yet another appeal. (emphasis added)

[18] Justice VC George in the case of *Amanah Merchant Bank Bhd v. Sumikin Bussan Kaisha Ltd* [1992] 4 CLJ 2241; [1992] 2 CLJ (Rep) 59 held that an O. 14 application should not be granted when any serious conflict of the facts or any real difficulty on a matter of law arises. But however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable, it would give final judgment.

Construction Of The Guarantee

[19] We are of the considered opinion that this appeal involves purely on the construction of the guarantee and the liability of the respondent to the bank under the guarantee. There is no actual dispute of facts as far as the guarantee is concerned. Pursuant to the guarantee, the respondent irrevocably and unconditionally undertook the following obligations and liabilities:

> **(i) 2.2 Guarantee**
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> The Guarantor irrevocably and unconditionally guarantees:
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> (a) to pay to BPMB on demand, and in the currency in which the same falls due for payment, all moneys and liabilities which are now or at any time hereafter shall have been advanced to, become due, owing or incurred by the Borrower to or in favour of BPMB under or in connection with any of the Security Documents; and

(b) the due and punctual performance and discharge by the Borrower of all of its obligations and liabilities under each of the Security Documents.

(ii) 2.3 Indemnity

The Guarantor, as the principal obligor and as a separate and independent obligation and liability from his obligations and liabilities under clause 2.2, irrevocably and unconditionally agrees to indemnify BPMB in full on demand against all losses, costs and expenses suffered or incurred by BPMB arising from or in connection with:

(a) BPMB's making available the Facilities or any part thereof;

(b) BPMB's entering into any of the Security Documents;

(c) any of the provisions of any of the Security Documents being or becoming void, voidable, invalid or unenforceable; and

(d) the failure of the Borrower to fully and promptly perform any of its obligations to BPMB under any of the Security Documents, together with all costs, expenses and other amounts payable by the guarantor under this Guarantee.

(iii) 4.1 Guarantee becoming enforceable

If any Event of Default occurs, then, in addition and without prejudice to the rights and remedies of BPMB under any of the Security Documents, the security hereby constituted will become immediately enforceable and the powers conferred by this Guarantee, or under general law as varied or extended by this Guarantee will become immediately exercisable.

(iv) 5.1 Continuing security

The security created by this Guarantee:

(a) will be held by BPMB as a continuing security for the payment and discharge of the indebtedness and the security so created will not be satisfied by any intermediate payment or satisfaction of any part of the indebtedness; and

(b) will be in addition to and will not in any way be prejudiced or affected by any security arrangement made or granted by any Security Party in favour of BPMB from time to time.

(v) 5.2 Liability of Guarantor not affected

Without limiting the generality of the provisions of clause 5.1, the Guarantor acknowledges and agrees that none of his liabilities under this Guarantee will be reduced, discharged or otherwise adversely affected by:

A (b) any termination, amendment, variation, novation, supplement or release of or to any of the Security Documents; or

...

(h) any act or omission which would not have discharged or affected the liability of the Guarantor had it been a principal B debtor instead of Guarantor or indemnitor or by anything done or omitted by any person which but for this provision might operate to exonerate or discharge the Guarantor or otherwise reduce or extinguish its liability under this Guarantee.

(vi) 5.3 Primary obligation

C (a) The obligations and liabilities expressed to be undertaken by the Guarantor under this Guarantee are those of a primary obligor and not merely as a surety.

(b) BPMB will not be obliged before taking steps to enforce any of the rights and remedies under this Guarantee: D

a. To take action or obtain judgment in any court against the Borrower or any other person;

b. To make or file any claim in bankruptcy, liquidation, administration or insolvency of the Borrower or any other E person;

c. To make demand, enforce or seek to enforce any claim, right or remedy against the Borrower or any other person.

(vii) 8.1 No deductions or set-off

All sums payable by the Guarantor under this Guarantee will be paid F to BPMB in full:

(a) without any set-off, counterclaim or condition whatsoever; ...

(viii) 15.2 Statement of Account

The Guarantor hereby expressly agrees that a statement of account G issued by BPMB as to the amount of any moneys and liabilities for the time being incurred or due to BPMB by the Guarantor will, save for manifest errors, be final and conclusive proof of the indebtedness of the Borrower under the Facility for all purposes whatsoever including purposes of legal proceedings and will not be questioned on any account whatsoever.

H **(ix) 15.6 Continuing liabilities and obligations**

The liabilities and obligations created by this Guarantee are expressly intended to be and will be a continuing liability and obligation for all moneys whatsoever now or hereafter and from time to time due and owing by the Guarantor to BPMB under the I Facilities.

[20] Like any other contract, the construction of a contract of guarantee depends primarily upon its expressed terms, and the respective rights of the parties must be gathered from the terms of the guarantee. This observation was stated clearly by the Federal Court in *Heng Cheng Swee v. Bangkok Bank Ltd* [1979] 1 LNS 179; [1976] 1 MLJ 267, where it was held that a contract of guarantee depends primarily on its expressed terms and cannot be varied by oral evidence; secondly, to determine the defendant's rights which are embodied in the guarantee, it is only necessary to look at the guarantee itself.

[21] This position was reaffirmed by the Federal Court in *The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717; [2014] 6 MLJ 153, where Zainun Ali FCJ held as follows:

> [156] Having said that, **it is a truism that a guarantee** unlike an insurance, **is not a contract *uberrimae fidei*.** This observation was stated clearly by the Federal Court in *Heng Cheng Swee v. Bangkok Bank Ltd* [1979] 1 LNS 179; [1976] 1 MLJ 267, where it was held that a contract of guarantee depends primarily on its expressed terms and cannot be varied by oral evidence; secondly, to determine the defendant's rights which are embodied in the guarantee, it is only necessary to look at the guarantee itself.
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> [157] The same approach was taken by the Rt Hon Justice Arifin Zakaria when His Lordship had occasion to interpret a contract of guarantee in *Talasco Insurance Sdn Bhd v. Lembaga Kemajuan Pahang Tenggara (DARA)* [1996] 1 LNS 342; [1996] MLJU 582 where His Lordship observed that:
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> > **In the construction of a contract of guarantee it has also been said that a rigid adherence to the terms of the agreement need to be observed.** As stated by the Court in *Blest v. Brown* [1862] 45 ER 1225:
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> > > ... It must always be recollected in what manner a surety would bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore merely according to the proper meaning and effect of the written engagement that he has entered into.
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> [158] **Likewise, in the case of payment made for performance bond or guarantee, there has to be strict compliance with the terms of the said performance bonds or guarantees,** as illustrated in authorities such as *Teknik Cekap Sdn Bhd v. Public Bank Bhd* [1995] 4 CLJ 697; [1995] 3 MLJ 449 and *Kerajaan Malaysia v. South East Asia Insurance Bhd* [2000] 3 CLJ 705; [2000] 3 MLJ 625. (emphasis added)

A *Guarantee Incorporates Both Guarantee And Indemnity*

[22] Clauses 2.2 and 2.3 of the guarantee incorporates both a contract of guarantee and a contract of indemnity. It is very clear from the terms of the letter of guarantee and indemnity executed by the respondent that the contract entered into between the bank and the respondent is a separate and
B independent contract, and that the contract is a contract of indemnity.

[23] In *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295, the Supreme Court explained that in a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, as distinct from a contract of guarantee which is a collateral
C contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee.

Principal Obligor/Debtor

[24] Therefore, from a reading of both cls. 2.2 and 2.3 of the guarantee, the
D respondent had given both a guarantee and an indemnity as a principal obligator or principal debtor. This has been reaffirmed by cl. 5.3, which provides that the obligations and liabilities expressed to be undertaken by the respondent/guarantor under the guarantee are those of a primary obligor and not merely as a surety.

E **[25]** The effect of a principal obligor clause or "principal debtor" clause has been explained by the Federal Court's judgment delivered by Zulkefli Makinudin CJ (Malaya) (as he then was) in *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; [2013] 1 MLJ 449, where it was held that a principal obligor is primarily liable for the principal
F borrower's indebtedness to a lender and such a liability is not dependent or secondary to the liability of the principal borrower. The court held in paras. [22] and [23] as follows:

> [22] It is our finding that the letter of guarantee and indemnity contained several clauses which clearly show the intention of both guarantors to
G undertake the liability for the repayment of the term loan and interest therein not merely as sureties but also as a principal debtors as well as indemnifiers. The relevant cls. 9, 17 and 21 of the letter of guarantee and indemnity are reproduced as follows:
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> Clause 9
>
> H Though as between us and the customer we are sureties only for the customer, yet as between you and us we shall be deemed to be principal debtors for all the monies the payment of which is hereby guaranteed and accordingly we shall not be discharged nor shall our liability be affected in any way by any fact circumstance
I act omission or means whatsoever whether known to you or not whereby our liability hereunder would have been discharged if we had not been principal debtors.

Clause 17

As a separate and independent stipulation we hereby agree that in the event the monies hereby guaranteed may not be recoverable on the footing of a guarantee, whether by reason of any legal limitation, disability or incapacity on the part of the customer or any other fact or circumstance, and whether known to you or us or not, shall nevertheless be recoverable from us as sole or principal debtor in respect of it and shall be paid by us on demand.

Clause 21

For the consideration aforesaid and as a separate and independent stipulation in addition to and not in derogation of the guarantee herein given we hereby irrevocably and unconditionally undertake to indemnify you and keep you indemnified fully and completely against all claims and demands actions and proceedings losses damages costs and expenses including legal costs as between a solicitor and client and all other liabilities of whatsoever nature or description which may be made taken incurred or suffered by you in connection with or in any manner arising out of the facilities.

[23] It is our considered view that in the present case the *appellant, being a person who has given a guarantee and more importantly an indemnity, is primarily liable for losses which the principal borrower could not have been made liable. His liability is not dependent or secondary to the liability of the principal borrower. He is a principal debtor himself. The liability under a contract of indemnity does not depend on whether the principal debt is enforceable. It has no reference in law to the obligation of any third person. In essence, the liability of the person who has given an indemnity can be more extensive than that of the liability of the principal borrower.* (See the cases of (1) *Yeoman Credit Ltd v. Latter & Anor* [1961] 2 All ER 294 and (2) *Chung Khiaw Bank Ltd v. Soi Huan & Ors* [1985] 1 LNS 71. (emphasis added)

[26] In other words, even if the lender (bank) cannot recover the loan from the principal borrower (ABN) for any reason, the principal obligor (respondent) is still liable to the lender (bank) under the principal obligor clause. Accordingly, we are of the considered opinion that the respondent is primarily liable to the bank under the principal obligor clause for the principal borrower, ABN's indebtedness. The respondent's liability is not dependent on or secondary to the liability of the principal borrower, ABN. The guarantee is a stand-alone agreement where the respondent has agreed to be the principal debtor himself. Therefore, when an 'event of default' has occurred and the sum of RM236,796,198.64 is due and owing by ABN to the bank, the bank is entitled to claim the said sum from the respondent as a principal debtor under the terms of the guarantee.

[27] A similar issue was raised in *Chung Khiaw Bank Ltd v. Soi Huan & Ors* [1985] 1 LNS 71, where the Supreme Court held as follows:

The first line of defence is that the liability of a guarantor is secondary and does not arise until the liability of the principal debtor has been legally established. Then it is submitted that until the Company's Suit in the Muar High Court is finally determined the Bank cannot proceed further against the defendants. But Clause 15 of the Guarantee provides:

> Though as between us and the Customer we are sureties only for the Customer, yet as between us and you we and each of us shall be deemed to be *principal debtors* for all the moneys the payments of which is hereby guaranteed and accordingly shall not be discharged nor shall our liability be affected by any fact or circumstances or any act thing omission or means whatsoever, whereby our liability would not have been discharged if we had been the principal debtors.

Those interested in the history of this kind of wording and the loophole that it was intended to plug, may refer to the commentary on *Coutts & Co v. Browne-Lecky & Ors* [1947] KB 104 in *J Milnes Holden's Law and Practice of Banking* Vol. II page 234 paras. 1944 to 1947 Securities for Bankers' Advances. *In a nutshell the result of this wording was to make any legal incapacity of the borrower irrelevant because by virtue of the clause just quoted the persons executing it can be treated as primarily liable and sued accordingly. It therefore appears to me that the claim for damages by the Company against the Bank in the Muar High Court Civil Suit is no answer to the Bank's claim against the guarantors in this action.* (emphasis added)

Whether The Respondent Is Protected In Equity

[28] However, despite making a finding that the provisions in the guarantee is in absolute term and that the respondent is liable for any default in payment by the ABN, the learned Judicial Commissioner had dismissed the bank's application for summary judgment on the basis that as a surety, the respondent is protected under the law of equity when the bank is said to be acting in an unequitable and unconscionable manner against the borrower, ABN. The learned Judicial Commissioner had accepted the respondent's contention that he is discharged from the guarantee due to the bank's unconscionable conduct and failure to act in good faith which he claimed to be the triable issues in this case.

[29] The respondent's complaint against the bank is that the bank had jeopardised the ABN project and ultimately caused the winding up of ABN by Sony Malaysia Sdn Bhd by the following acts:

(i) the delayed and the erratic disbursement of the term loan during the critical gestation period of the ABN project;

(ii) the unilateral imposition of unreasonable timelines;

(iii) the proposed equity capitalisation that altered the character of financing;

(iv) the suspension of the term loan when the equity capitalisation was not accepted; and

(v) the rejection of the s. 176 Scheme which ultimately led to the winding up order against ABN.

[30] Based on these complaints, the learned Judicial Commissioner applied the case of *Anthony Lawrence Bourke & Anor v. CIMB Bank Bhd* [2017] 10 CLJ 167; [2018] 1 MLJ 104 where it was held that a bank owes a duty to the customer to exercise reasonable care and skill in disbursing the loan in accordance with the terms of the loan agreement.

[31] We are of the considered opinion and we agree with the bank that the complaints raised by the respondent are issues that can be raised by ABN in Suit No. BA-22NCC-23-03-2021. However, under cl. 5.2 of the guarantee, the respondent has agreed that his liabilities will not be reduced, discharged or adversely affected by "any termination, amendment, variation, novation, supplement or release of or to any of the security documents:" Any alleged unilateral variation to the loan agreement executed by ABN has no bearing on the guarantee. Added to that, cl. 5.2 also provides that the respondent's liabilities would not be discharged by "any act or omission ... which but for this provision might operate to exonerate or discharge the guarantor or otherwise reduce or extinguish its liability under this guarantee."

[32] Further, pursuant to cl. 8.1, all sums payable by the respondent under the guarantee will be paid in full without any set-off, counterclaim or condition whatsoever. Therefore, pursuant to the said provisions under the guarantee, the respondent has clearly contracted his rights away and he is therefore precluded from raising any complaint that he is entitled to be discharged in equity. The learned Judicial Commissioner has clearly erred in law in her finding that the respondent is protected under the law of equity.

[33] In *Amanah Merchant Bank Bhd v. Sumikin Bussan Kaisha Ltd* (*supra*), Justice VC George held that it is settled law that a guarantor can contract away rights which he would otherwise have. His Lordship referred to the Federal Court decision in *Heng Cheng Swee v. Bangkok Bank Ltd* (*supra*) where the construction of a contract of guarantee depends primarily upon its expressed terms and that the effect of a guarantee depends very much on the form of words used in the contract. His Lordship added as follows:

> And in *Perry v. National Provincial Bank of England* [1910] 1 Ch. 464 at 471, Cozens-Hardy MR said:
>
> > This is a curious case arising out of the law of principal and surety. It is important to distinguish clearly between the rights of a surety under an ordinary contract of suretyship not containing any special provisions and the rights of a surety where the instrument creating the suretyship contains certain special clauses. It is elementary law

A that in a simple case of principal and surety the surety is discharged if the creditor gives time to the principal or does certain other acts; and, a *fortiori*, if the creditor releases the principal debtor, of course the surety is released too. There are a certain number of acts which will not release, the surety if, when the act in question is done, there is a reservation of rights against the surety. A common
B instance of this is giving time. *When you find in the instrument of suretyship itself a provision that the surety shall be liable notwithstanding certain acts being done by the creditor which would otherwise release him, these doctrines have no application at all. It is not then a simple contract of suretyship. It is true that in one sense it is a contract of suretyship, but*
C *it is a contract of suretyship containing special clauses which deliberately exclude certain rights which the surety would otherwise have had.*

Even the right of subrogation can be contracted away. In *O'Day v. Commercial Bank of Australia Ltd.* [1933] 50 CLR 200, a decision of the High Court of Australia, Dixon J said commencing at the bottom of p. 219:

D The ordinary rights of a surety in respect of securities given by the principal debtor do not exist in the present case. *Each of the instruments of suretyship contains elaborate provisions which effectually disentitle the surety to any interest in, and to any rights in respect of the Security whether by way of subrogation or otherwise. It follows that no*
E *reliance could be placed upon a contention that the acts of the bank amounted to a wrongful dealing with securities discharging the surety.*

The principle was accepted in Canada as can be seen in *Roynat Ltd. v. Denis et. al.* 139 DLR (3d) 265, where at p. 279 the Judge found assistance from an earlier judgment of the Supreme Court of Canada referred to at
F pp. 426-7 DLR:

Despite this rule, *it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule requiring preservation of his Security.* If authority is needed for such a proposition, it may be found in *Rose v. Aftenberger et. al.* [1969] 9 DLR (3d) 42 at p. 47 [1970] 1 OR 547 CA at p. 552, where
G Laskin JA, as he then was, speaking for the Ontario Court of Appeal, said:

The law is that sureties are entitled to the benefits of any Security taken by a creditor who has their promise to pay the debt of the principal obligor, unless the sureties have
H contracted themselves out of this right or are estopped from asserting it. In this connection, it is immaterial when the Security was taken or whether the guarantor knew of it at the time. (emphasis added)

[34] In *Citibank N.A v. Ooi Boon Leng & Ors* (*supra*) the Federal Court at 284
I held that where the guarantor has abrogated his rights, he cannot resile from his position:

> In any event, the contract of guarantee contains express provisions giving the bank the right to do or omit to do certain things without thereby prejudicing its right against the respondents. Clause 8 provides that the bank may recover from the respondents notwithstanding any failure on its part to take any security or that any security given to the bank is invalid. Clause 16 enables the bank at its absolute discretion and without notice to or consent of the respondents to vary or alter the contract between the bank and the company and that any right of the respondents which is inconsistent with the terms of the contract has been waived by them. *In other words there was a voluntary waiver of the rights of the respondents to be subrogated on payment of the loan. Accordingly where the respondents have promised to waive any variation or alteration and the bank has proceeded with the performance of the contract on that basis it would be in our opinion inequitable to allow them to resile from the contract.* (emphasis added)

[35] In *American Express Sdn Bhd v. Dato' Wong Kee Tat & Ors* [1990] 1 CLJ 17; [1990] CLJ (Rep) 1; [1990] 1 MLJ 91, among others, the respondents (directors and shareholders) appealed against the order of summary judgment granted to the appellant bank contending they should be given unconditional leave to defend. The company had defaulted in payment of the money loaned. The appellants brought a writ against the respondent claiming the sums due under their personal guarantees. Under the guarantees, the respondents undertook to be responsible until repayment of the ultimate balance whatever the position of the principal borrower. In allowing the appellants to sign final judgment on the sums claimed against all the respondents, the Supreme Court adopted the approach in *Continental Illinois National Bank and Trust Company of Chicago v. John Paul Papanicolaou; The Fedora* [1986] 2 Lloyd's Rep 441, where the Court of Appeal held:

> (2) *The purpose of the guarantee was to ensure immediate payment if the principal debtor did not pay; the court ought not to interfere since the parties had specifically provided both in the loan agreements and the guarantees that payment should be made free of any set-off or counterclaim; it would defeat the whole purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment which both the borrowers and the guarantors intended it should have while protracted proceedings* in the alleged counterclaims were litigated; ... (emphasis added)

[36] In *Export-Import Bank of Malaysia Bhd v. Secco Engineering Sewarage & Environmental Co Ltd & Ors* [2012] 9 MLJ 839, Nallini Pathmanathan J (now FCJ) made similar findings as follows:

> [25] I therefore have no hesitation to conclude that the facility agreement was wide enough to ensure that the failure to appoint the PMA at the material time did not affect the corporate guarantee. Indeed, it must be pointed out here that not only does the facility agreement have such an effect, but the corporate guarantee executed between the plaintiff and the fourth defendant does not indicate otherwise either. It is trite that 'a

person who is not a party to a contract cannot claim benefit under the contract. *Therefore the fact that money was released to the first defendant contrary to the terms of the loan agreement, or the relevant debenture, could not affect the liability of the 4th defendant towards the plaintiff under the guarantee. The guarantee should be read independently of the other agreement between the Plaintiff and the 1st defendant unless the guarantee itself provides otherwise which the guarantee here does not*' (per Arifin Zakaria J, as the honourable Chief Justice then was, in *Malayan Banking Bhd v. Mawai Products Sdn Bhd (in receivership) & 3 Ors* [1995] 1 BLJ 43; [1994] MLJU 327). (emphasis added)

[37] Under the guarantee, the respondent had contracted to pay the bank without any set-off or counterclaim. The respondent had also agreed that his liabilities would not be affected or discharged by any termination, amendment or variation of the security documents. Therefore, whatever claim the borrower ABN may have against the bank has no bearing on the guarantee and does not affect the liabilities of the respondent under the guarantee. The respondent is not merely a surety, but a principal debtor. As such, he is not entitled to be discharged from his liability under the guarantee by virtue of cl. 5.2 of the guarantee, despite the pending suit by ABN. (see *Bank Bumiputra Malaysia Bhd, Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495; [1993] 2 MLJ 76 (SC)).

[38] With regard to the learned Judicial Commissioner's reliance on the case of *Anthony Lawrence Bourke & Anor v. CIMB Bank Bhd* (*supra*), we are of the considered opinion that such reliance was clearly misplaced. In *Anthony Lawrence Bourke* (*supra*) the bank was sued by its customer for failing to disburse a housing loan to the developer, thereby resulting in the termination of the SPA entered between the customer and developer. The customers were the purchasers of the house and sought damages suffered due to the termination of the SPA. It is completely different from the present case where the bank is claiming the sum due and owing by the respondent under the guarantee.

Policy Consideration

[39] We are of the considered opinion and we agree with the bank that the learned Judicial Commissioner also erred in taking into consideration an irrelevant factor in arriving at her decision, that the project should not have failed as it was supported by the Government (by way of a grant) and the so-called public policy that the bank has a duty to facilitate the borrower towards achieving the project's objective.

[40] We find that the issue of public policy is plainly irrelevant to the respondent's obligation to pay the sum due under the guarantee. On settled principles, the bank's rights to enforce the guarantee and the respondent's liability are found within the four corners of the guarantee itself. (see *The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* (*supra*); *Heng Cheng Swee v. Bangkok Bank Ltd* (*supra*)).

[41] Further, we agree with the bank that it is not the respondent's pleaded case that the relationship between him, ABN and the bank is anything other than that of a lender/debtor. Given this, the duty of good faith and fair dealing clearly does not arise. In *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773, the Court of Appeal held that the duty of good faith and fair dealing is not a suitable subject matter to be imposed on a banking transaction:

> [328] The relevant law on the facts of this appeal must surely be what is the duty of good faith and fair dealing in a banker customer relationship in a loan transaction scenario? **Can the duty of good faith and fair dealing be readily implied as a matter of contractual construction against this particular contractual context?**
>
> [329] Absent any peculiar special relationship between lender and borrower, *a borrower-lender relationship in a banking transaction, noted for very detailed and precise terms (invariably drafted and vetted by lawyers for both sides) being incorporated in the contract document, cannot with respect be a suitable subject matter to interpose any general obligation of good faith and fair dealing.* The twin requirements of certainty and predictability in banking transactions have to be accorded primacy consistent with commercial needs and sensibilities. In my view, the banking industry is best guided, and its continuing growth secured when disputes between parties can be resolved by reference to the actual written terms and conditions in the contract documents, without interposing them with an overarching and uncertain perceived equitable obligation of good faith and fair dealing. In this connection, the cases supporting the position that *in an ordinary borrower-lender relationship there cannot be a fiduciary relationship again become very relevant.* The cases have been referred to earlier, and again it is not necessary to repeat them here. (emphasis added)

[42] In the circumstances, we find that the learned Judicial Commissioner was plainly wrong to hold that the bank has a duty to facilitate ABN towards achieving the ABN project's objective based on grounds of public policy.

Statement Of Account Under Cl. 15.2

[43] Under cl. 15.2 of the guarantee, the respondent has agreed that a statement of account issued by the bank 'as to the amount of any moneys and liabilities for the time being incurred or due to BPMB by the guarantor will, save for manifest errors, be final and conclusive proof of the indebtedness of the borrower under the facility for all purposes whatsoever including purposes of legal proceedings and will not be questioned on any account whatsoever'.

[44] The bank had issued the statement of account in exh. BPMB14. The statement of account clearly shows the amount owing by ABN to the bank, which the respondent is liable to pay the bank. Therefore, pursuant to the case of *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006]

2 MLJ 685, we are of the considered opinion that the statement of account is *prima facie* evidence of the sum owing and this was not disputed by the respondent.

Conclusion

[45] It is clear that the guarantee which the parties have entered into was executed with the intention of protecting the bank against the non-payment of the loans given to the borrower, ABN. The terms and conditions in the guarantee must be given a strict interpretation of what the parties have intended.

[46] The respondent had given an unconditional guarantee, as the principal obligor/debtor, to pay the bank on demand upon the happening of the 'event of default'. As an 'event of default' has occurred under the facility and the sum of RM236,796,198.64 is due and owing by the borrower to the bank, the bank is entitled to claim for this sum from the respondent under the terms of the guarantee.

[47] The respondent's liability under the guarantee is independent of the facility agreement and therefore any claims that ABN may have in Suit BA-22NCC-23-03-2021 against the bank does not discharge the respondent from his obligation to pay.

[48] In the circumstances, we find that this is a fit case to allow the application for summary judgment. The decision of the learned Judicial Commissioner is set aside and summary judgment is entered against the respondent in terms of the application. As the appellant is withdrawing their prayer for costs on an indemnity basis, we allow costs of RM10,000 here and RM5,000 below to the appellant subject to allocator fees.